SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 184

A. N. VONE,

Petitioner,

vs.

WEST VIRGINIA PULP AND PAPER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO RECALL AND AMEND MANDATE

H. Wayne Unger,
W. J. McLeod, Jr.,
J. P. Mozingo, III,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 184

A. N. CONE,

Petitioner,

vs.

WEST VIRGINIA PULP AND PAPER COMPANY,

Respondent

MOTION TO RECALL AND AMEND MANDATE

Your Petitioner, A. N. Cone, hereby respectfully moves this Honorable Court to recall the Mandate in the above case, filed in the United States District Court for the Eastern District of South Carolina during this term for the purpose of Amending the said Mandate; and

1. To issue a memorandum opinion to make more definite and certain that this Court's interpretation of Rule 50b requires the making of a motion for a new trial, as well as, or in the alternative, with a motion for judgment notwithstanding the verdict before the Circuit Court of Appeals can pass upon the legal issues raised by such motions.

2. To require the said District Court of the United States for the Eastern District of South Carolina, Charleston

Division, to issue execution on the original judgment of the plaintiff, filed in said Court founded upon the verdict of the jury.

3. To direct the District Court to levy execution against the defendant for the costs of your Petitioner in this Court, in accordance with the mandate of this Court previously filed there, without regard to any off set of costs awarded the Respondent in the Circuit Court of Appeals, Fourth Circuit, which was reversed by this Honorable Court.

4. And for such further and other amendments as this Honorable Court may deem necessary and proper to provide a final determination of this case since the Respondent failed to comply with Rule 50b in not making a motion for a new trial on the grounds of erroneous introduction of testimony or any other grounds, or for judgment notwithstanding the verdict, in the alternative as he had the privilege to do.

Respectfully submitted,

H. Wayne Unger,
Walterboro, South Carolina;
W. J. McLeod, Jr.,
Walterboro, South Carolina;
J. P. Mozingo, III,
Darlington, South Carolina,
Attorneys for Petitioner, A. N. Cone.

May 17, 1947.

Notice

To: Messrs. Christie Benet and Charles W. Waring.

You will please take notice that Petitioner will submit the above motion to the Supreme Court of the United States in the Court Room at Washington, D. C., on Tuesday, the

27th day of May 1947, at twelve o'clock noon, or as soon thereafter as counsel may be heard.

H. WAYNE UNGER,
Walterboro, South Carolina;
W. J. MCLEOD, JR.,
Walterboro, South Carolina;
J. P. MOZINGO, III,
Darlington, South Carolina,
Attorneys for Petitioner, A. N. Cone.

May 17, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 184

A. N. CONE,

Petitioner,

vs.

WEST VIRGINIA PULP AND PAPER COMPANY,

Respondent

BRIEF ON MOTION TO RECALL AND AMEND MANDATE

To the Honorable Supreme Court of the United States:

1. Your Petitioner respectfully submits, that the misinterpretation of the opinion and mandate of this Court, heretofore filed in the District Court, during this term, by the Honorable J. Waties Waring, Judge of the United States District Court, for the Eastern District of South Carolina, Charleston Division, by his order dated May 13, 1947 (hereto attached), will lead to confusion in the orderly process of trial under Rule 50b of the Rules of Civil Procedure, if uncorrected.

Unless this Court recalls its mandate and issues instructions as prayed in this motion, the clear intent of this Court's opinion will be nullified by such misinterpretation.

It is the position of your Petitioner, that under the record in this case, where there was no motion for a new trial on the grounds of the introduction of erroneous testimony before the Trial Judge, within ten days after judgment for the Petitioner, the Court of Appeals was without authority to grant a new trial on such grounds, and a new trial was not ordered or intended by the opinion and mandate of this Court and such should be clearly so ordered at this term.

Your Petitioner respectfully submits that since the Court of Appeals, Fourth Circuit, in this case, did not order a new trial but did order entry of judgment for the defendant, it was, therefore, naturally the order of judgment for the defendant which was specifically appealed from and referred to by this Court in its opinion. Nevertheless, the record in this case specifically shows that there was no motion for a new trial on the grounds that the Court had erred in permitting the introduction of the deed and plat which the Court of Appeals by dictum indicated it thought was sufficient error to warrant a new trial. That Court stated: "It may be interjected here that harmful error unquestionably took place in the admission and failure to take from the jury of testimony with respect to the plaintiff's purported chain of title prior to the deed from his mother to him. * * * Specifically, we have already indicated our opinion that prejudicial error occurred in the admission of evidence with reference to the plaintiff's alleged predecessor in title. This ground alone is sufficient to require a remand of the case for a new trial." *West Va. Pulp & Paper Co.* v. *Cone*, 153 F. (2d) 576, pages 578 and 581.

This Court, in its opinion by Mr. Justice Black, stated: "Other questions have been discussed here, but we do not consider them. Consequently, we accept, without approving or disapproving, the Circuit Court of Appeals' holding

that there was prejudicial error in the admission of evidence and in the submission of the case to the jury."

The Honorable J. Waties Waring, District Judge, in construing the above language of the Circuit Court of Appeals and of the opinion of this Court, in his order staying execution by the Petitioner on his original judgment, stated: "In the opinion of the Supreme Court, it is stated that the holding of the Circuit Court of Appeals that there was prejudicial error in the admission of evidence and submission of the case to the jury was accepted without approving or disapproving of the same; and the question decided was limited solely to the power of the Circuit Court of Appeals to direct the entry of judgment for the defendant where there had been a failure to make a motion in the District Court for judgment notwithstanding the verdict as permitted in Rule 50b of the Federal Rules of Civil Procedure.—The effect of the appeal seems to be that the views of the Circuit Court of Appeals as to the impropriety of the admission of evidence and the failure of sufficient proof will prevail; but that the Circuit Court of Appeals, instead of ordering a new trial, erred in directing entry of judgment for the defendant. I can not avoid the conclusion that the practical effect of these two decisions, one by the intermediate appellate court, and the other by the Supreme Court, is that the judgment obtained in the District Court is set aside and the case is here for a new trial."

It thus can be seen that the trial court has become confused as to the meaning of this Court's opinion in the light of the fact that this Court referred only specifically to the necessity of a motion for judgment notwithstanding the verdict.

Your Petitioner respectfully submits that the opinion of this Court requires the making of a motion for a new trial necessary before the Trial Judge and within ten days after verdict and judgment, under Rule 50b as well as the mak-

ing a motion for judgment notwithstanding the verdict or, in the alternative, before the Court of Appeals can establish any law of the case or can review the legal action of the District Court on the grounds laid in such motions.

The heart and soul of this Court's opinion, rules that the Trial Judge, with the evidence fresh before his mind, and testimony still in his immediate memory, must have the opportunity to pass upon whether or not there should be a setting aside of the judgment and whether an entry of judgment for the defendant should be made, or a new trial ordered.

This Court stated in its opinion: "Rule 50b contains no language which absolutely requires a Trial Court to enter judgment notwithstanding the verdict, even though that Court is persuaded that it erred in failing to direct a verdict for the losing party. The rule provides that the Trial Court 'may re-open the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.' This either-or language means what it seems to mean, namely, that there are circumstances which might lead the trial court to believe that a new trial rather than a final determination of the trial stage of the controversy would better serve the ends of justice. In short, the rule does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives. And he can exercise this discretion with a fresh, personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the *bona fides* of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. *Determination of whether a new trial should be granted or a judgment entered under Rule 50b calls for the judgment in the first instance, of the judge who saw and heard the wit-*

nesses and has the feel of the case which no appellate, printed transcript can impart." • • • The Respondent failed to submit a motion for judgment notwithstanding the verdict to the Trial Judge in order that he might exercise his discretionary power to determine whether there should be such a judgment, a dismissal or a new trial. In the absence of such a motion, we think the appellate court was without power to direct the District Court to enter judgment contrary to the one which it had permitted to stand."

This Court, in *Montgomery Ward & Co.* v. *Duncan*, 61 S. Ct. 189, 311 U. S. 243, has previously ruled that both parties have a *right* to have the District Court pass upon a motion for a new trial as well as motions for judgment notwithstanding the verdict. The difference in legal grounds of motion for new trial and for judgment n. o. v. to lay the basis for appellate action are discussed fully in this case. The Court, through Mr. Justice Roberts, therein stated: "Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the Court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of *alleged substantial errors in admission or rejection of evidence* or instructions to the jury. • • • "The rule contemplates that either party to the action is entitled to the Trial Judge's decision on both motions, *if both are presented.*" • • • "The grounds assigned for a new trial have not been considered by the court." • • • *"If alternative prayers or motions are presented,* as here, we hold that the Trial Judge should rule on the motion for judgment. Whatever his ruling thereon

he should also rule on the motion for a new trial, indicating the grounds of his decision. If he denies a judgment n. o. v. and also denies a new trial the judgment on the verdict stands, and the losing party may appeal from the judgment entered upon it, *assigning as error both the refusal of judgment n. o. v. and errors of law in the trial, as heretofore.* The appellate court may reverse the former action and itself enter judgment n. o. v. or it may reverse and remand for a new trial for errors of law."

Your Petitioner respectfully submits that it is clear from the above *Montgomery Ward & Co.* v. *Duncan* case and this Court's opinion in this case that the Circuit Court of Appeals can not pass upon errors of the introduction of testimony at trial without the prior making of such a motion for a new trial within the ten days and without the *nisi prius* court passing upon such motion. Nevertheless, this point should be specifically passed upon by this Court in the instant case for the benefit of the bench and the bar for the reason that the *Montgomery Ward & Co.* v. *Duncan* case came up under procedural facts where both motion n. o. v. and a motion for a new trial were made and this Court remanded the case to the District Court to pass upon the motion for a new trial and, therefore, no specific ruling was made in that case that the motion was required. In this Court's opinion in the instant case, since the action of the Court of Appeals in entering judgment for the defendant was appealed from, the Trial Judge takes the position that this Court's opinion is not controlling and that the question of the necessity of a motion for a new trial was not specifically passed upon and, consequently, has stayed execution of your Petitioner's judgment in the District Court.

Your Petitioner respectfully submits that the opinion of this Court, having been handed down during this same term, and the matters having been considered on Writ of Certi-

orari, in equity, and good conscience, this Court should recall its mandate and make this point specifically clear that under the record in this case, where no motion for a new trial on the grounds of error in the admission of testimony was made, the Court of Appeals could not order a new trial. Unless this Court so amends its opinion and mandate, your Petitioner will be forced to appeal from the order of the District Court (misconstruing the opinion of this court) to the Court of Appeals, Fourth Circuit, and possibly thence, by Petition for Writ of Certiorari, again to this Court, in order to clarify the matter, and that it will be in the interest of justice to directly clarify this interpretation of Rule 50b by the amendments herein moved.

2. Your Petitioner respectfully submits that he is entitled to have execution on his original judgment in the District Court, together with interest and costs as therein set out. It is the position of the Petitioner that the correct interpretation of the opinion of this Court and the mandate sent to the District Court holds that the Court of Appeals was without authority to set aside his judgment duly entered in the District Court and that such judgment now stands in full force and effect since the Circuit Court of Appeals acted without authority.

If the Respondent had made a motion for a new trial as permitted and required by Rule 50b, within the ten days after entry of the Petitioner's judgment, and if the Trial Judge had ruled thereon, your Petitioner respectfully submits that the Trial Judge could have then set forth in his order his grounds for refusing a new trial for the guidance of the Court of Appeals, to wit: The District Court could have pointed out in his order that the deed and plat showing chain of title in the plaintiff prior to the deed from his mother (which the Circuit Court of Appeals later, by *dictum*, indicated was erroneous), was not unfair to the de-

fendant because prior to the trial the defendant had noticed the plaintiff that he would introduce the identical deed and plat; and during the defendant's case at trial, he actually introduced the same deed and plat, in his own case, pursuant to his notice, even though he had previously objected and, therefore, he did not suffer any injustice by having waived any objection. If this proper procedure had been followed, to wit: Making of the motion for a new trial, stating error in introduction of the said evidence, and if the order overruling said motion had been made, it is clear that the Court of Appeals would then have properly had before it the authority to pass upon whether or not such introduction was erroneous.

However, in the instant case no such motion on such grounds or any other grounds was made within ten days, and was never passed upon by the Trial Judge and, therefore, the Circuit Court of Appeals was without authority to establish any law of the case relative to error in introduction of testimony. This is not the law of the case according to your Petitioner. Unfortunately, however, it is submitted that the District Court has misconstrued the intent and meaning of the language of the opinion of this Court by Mr. Justice Black, to mean that the Circuit Court of Appeals was correct in holding error in the introduction of testimony and that the language of this Court's opinion thereby has automatically sent this case back for a new trial.

It is the position of your Petitioner that the term reversed as used by this Court in its opinion, has the ordinary and usual definition and effect. The definition of the word "reversed", in Words and Phrases, Vol. 37, page 575, is:

> "REVERSED. The term 'reversed' means turned backward or the contrary way; turned side for side or end for end. In re McInerney, 34 P. 2d, 35, 44, 47 Wyo. 258."

"The word 'reversed' in its technical sense applies to the ultimate decision annulling expressly what had been done before." *King* v. *Sloan*, Pa. 1 Serg. & R. 77, 79.

"The term 'reversed' as used in opinions, judgments, and mandates, has received by long usage in the Courts a settled construction, and means setting aside, annulling, or vacating." *Laithe* v. *McDonald*, 7 Kan. 254, 268.

Walsh Construction Co. v. U. S. Guarantee Co., 76 Fd. 2d, page 240, 243. "It is undoubtedly the fact, as already forecast, that, when an appellate court reverses a case, without more, the general understanding among bench and bar is that the case is at an end. If the situation anywhere requires further action in the name of justice, steps must be taken promptly to modify the opinion and judgment before the lapse of the current term; otherwise the mandate in the nature of a procedendo becomes a final and unalterable command to the nisi prius court."

Since the act of the Circuit Court of Appeals in setting aside judgment of the plaintiff was completely reversed by this Court, it was rendered null and void.

Words & Phrases, Vol. 37, page 574.

"REVERSE. To reverse is to overthrow, set aside, make void, annul, repeal, or revoke, as to reverse a judgment, sentence, or decree, or to change to the contrary, *or to a former condition.* The distinction between a reversal of a judgment and an affirmance with a modification is said by the court to be too marked and radical to justify them in disregarding it, and it is held that the reversal of a judgment nullifies the same and entirely vacates it." *Cowdery* v. *London & San Francisco Bank*, 73 P. 196, 197, 139 Cal. 208, 96 Am. St. Rep. 115.

Corpus Juris Secundum, Vol. 49.

JUDGMENTS. Section 449. "A judgment which is absolutely void is at all times a nullity." (Page 879, note 55.)

"A void judgment is a nullity for all purposes." *Texas Pacific Coal & Oil Co.* v. *Ames*, 284, S. W. 315 (*supra*).

"A void judgment of an appellate court has no more validity than a void judgment of any other court." *Faris* v. *City of Coruthersville*, 162 S. W. 2d, 237. *Ralph* v. *Annuity Realty Co.*, 28 S. W. 2d, 662. (*Supra*, Note 56.)

"It is not necessary to take any steps to vacate or avoid a void judgment; it may simply be ignored." (*Supra*, Page 880.)

Since the action of the Circuit Court of Appeals in setting aside the judgment entered in the District Court was reversed by this Court, it was absolutely null and void, its dictum with reference to the propriety of a new trial inserted in its opinion without the benefit of a prior motion for a new trial in the nisi court, was of no effect and left the Petitioner and the Respondent in the same position as if no judgment of the Appellate Court had been entered, restored them to their former condition, and restored the judgment of the trial court.

"A void judgment leaves the parties in the same position as though no judgment had been entered." *Hill* v. *Hill*, 185 S. W. (2d) 245; *Corpus Juris Secundum*, Vol. 49, page 879, note 56.

4 *Corpus Juris*, Section 3249, page 1204:

"The effect of a general and unqualified reversal of a judgment, order, or decree is to nullify it completely and to leave the case standing as if such judgment, order, or decree had never been rendered." *Sullivan* v. *Thomas*, 6 S. C. 201.

"Where a judgment of an intermediate court, holding erroneous a judgment below, is in turn held to be erroneous by a higher court, the second reversal will

usually operate to restore the judgment of the trial court;" (*Supra*, page 1205.)

Corpus Juris Secundum, Vol. 5, Appeal & Error:

"Effect of Reversal" Section 1950, page 1477.

"Where a judgment of an intermediate court, holding erroneous a judgment below, is in its turn held to be erroneous by a higher court, the second reversal will usually operate to restore the judgment of the trial court."

Your Petitioner, relying on the above law, as undisputable that the original judgment should be executed when the mandate of this Court was filed in the District Court, proceeded promptly to levy execution on the original judgment which was stayed by the District Court through its misinterpretation of the opinion of this Court. It is the position of your Petitioner that when this Court, in its opinion stated: "Other questions have been discussed here, but we do not consider them. Consequently, we accept, without approving or disapproving, the Circuit Court of Appeals' holding that there was prejudicial error in the admission of evidence and in the submission of the case to the jury," meant that it makes no difference whether or not the Court of Appeals so stated in their opinion because no motion for a new trial was made, grounded on error of law in the admission of evidence or the submission of the case to the jury and, consequently, such determination of grounds for a new trial was beyond the scope of authority of the Circuit Court of Appeals in the light of *Montgomery Ward & Co.* v. *Duncan* (*supra*).

Immediately upon the filing of the Order of the District Court staying execution of the original judgment, when your Petitioner first learned that the opinion was subject to misconstruction, it has made this motion to recall the mandate and to amend the same.

Your Petitioner respectfully submits that the law of this case as laid down under the proper interpretation of this Court's opinion of Rule 50b, entitles your Petitioner to have this Court direct the execution of the original judgment filed in the District Court, together with interest and costs.

3. Your Petitioner respectfully submits that he is entitled to levy execution against the defendant for the costs of your Petitioner in this Court, without offset of the costs awarded the respondent by the Circuit Court of Appeals. The mandate of the Circuit Court of Appeals directed to the District Court to set aside the judgment of your Petitioner and to enter judgment for the Respondent in the amount of its costs in the Court of Appeals, and direct execution of such judgment for costs against the Petitioner. It is clear that when this Court reversed the judgment of the Court of Appeals that the judgment for costs of the Court of Appeals against your Petitioner was a nullity (see above).

The confusion arising in the District Judge's mind in misinterpreting the opinion of this Court stands out most clearly in his holding that the opinion of this Court when it reversed the judgment of the Court of Appeals did not take away such a judgment but left it a valid binding award of costs which could be offset against the execution of costs in this Court by your Petitioner. The District Court's erroneous interpretation of the opinion of this Court that the respondent really prevailed in the Court of Appeals, even though such judgment was reversed, is clearly set forth in the Trial Judge's order, "In other words, it" (the respondent) "prays that it be allowed to off set its costs in the Circuit Court of Appeals, since it really prevailed there,—I think this position is well taken and the defendant, the West Virginia Pulp and Paper Company, will be allowed to tax its costs in the appellate proceedings in the Circuit Court

of Appeals and these will be offset against the costs taxed by the plaintiff in the proceedings in the Supreme Court."

Your Petitioner respectfully submits that since this motion is made before this Court during the same term in which the mandate of this Court was issued to the District Court, and has been made as soon as the misinterpretation by the District Court and its order based thereon was filed, that your Petitioner, in good conscience, is entitled to have the mandate recalled and amended by this Court to compel execution without offset, thereby specifically clarifying this Court's interpretation of Rule 50b; that the Court of Appeals was without authority to determine error in the admission of testimony in the absence of a motion for a new trial before the District Court and, therefore, the Respondent did not prevail before the Circuit Court of Appeals.

4. Your Petitioner respectfully submits that since the opinion in this Court in this case has been misconstrued by the District Court, and that a proper construction of the opinion of this Court, to wit: that the Court of Appeals was without authority to pass upon a motion for a new trial which had not been made upon grounds which had not been stated and which had not been ruled upon by the District Court within the ten days as required by the rule, the final effect of the reversal of the judgment of the Circuit Court of Appeals in this case is final and determinative of the action; that the determination in the Circuit Court of Appeals is without force and effect.

> "If" (the respondent) "has stumbled into a technical pit from which there is no escape, *this pit was of its own digging;* and settled rules of procedure may not be broken beyond repair by our letting down a ladder (if figures of speech may be mixed) on which to climb out." *Walsh Construction Co.* v. *U. S. Guarantee Co.*, 76 Fd. (2d) 240, page 243.

The effect of this Court's opinion has not been to automatically remand the case to the District Court for a new trial and that such further proceedings as may be had shall be upon execution of the original judgment of your Petitioner without regard to the opinion or mandate of the Circuit Court of Appeals which was reversed by this Honorable Court.

Respectfully Submitted,

H. Wayne Unger,
Walterboro, South Carolina;
W. J. McLeod, Jr.,
Walterboro, South Carolina;
J. P. Mozingo, III,
Darlington, South Carolina.

May 17, 1947.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

Civil Action No. 1227

A. N. CONE, *Plaintiff*,

vs.

WEST VIRGINIA PULP AND PAPER COMPANY, *Defendant*

Order

At the May 1945 Term the above cause came on for a trial before a jury and resulted in a verdict for the plaintiff of $15,000.00. The defendant appealed the case to the Circuit Court of Appeals for the Fourth Circuit and that court reversed the decision of the District Court (153 Fed. 2d, 576), holding that certain testimony had been improperly admitted and that there was not sufficient evidence on which to base a verdict. Instead of remanding the case for a new trial, the Circuit Court of Appeals "reversed with direction to enter judgment for the defendant."

The plaintiff petitioned, and was granted a writ of certiorari by the Supreme Court of the United States and that court reversed the order of the Circuit Court of Appeals by Opinion filed March 3, 1947, — U. S. —. In the Opinion of the Supreme Court, it is stated that the holding of the Circuit Court of Appeals that there was prejudicial error in the admission of evidence and submission of the case to the jury was accepted without approving or disapproving of the same; and the question decided was limited solely to the power of the Circuit Court of Appeals to direct the entry of judgment for the defendant where there had been a failure to make a motion in the District Court for judgment notwithstanding the verdict as permitted in Rule 50 (b) of the Federal Rules of Civil Procedure.

The plaintiff issued execution directed to the Marshal, based upon the belief that the action of the Supreme Court

had affirmed the verdict and judgment. The defendant appears by motion to set aside, cancel and stay the execution. After hearing full argument of the matter, I am of the opinion that this motion should be granted. The effect of the appeals seems to be that the views of the Circuit Court of Appeals as to the impropriety of the admission of evidence and the failure of sufficient proof will prevail; but that the Circuit Court of Appeals, instead of ordering a new trial, erred in directing entry of judgment for the defendant. I cannot avoid the conclusion that the practical effect of these two decisions, one by the intermediate appellate court, and the other by the Supreme Court, is that the judgment obtained in the District Court is set aside and the case is here for a new trial. It is, therefore, improper to issue execution, and I am of the opinion that a new trial must be had in the light of these decisions.

The defendant also served a motion which was heard today in the matter of costs. Its position is that it prevailed in the Circuit Court of Appeals and should be allowed to tax its costs against the plaintiff, although it admits that the taxable costs in the Supreme Court are to be charged against it, the defendant. In other words, it prays that it be allowed to offset its costs in the Circuit Court of Appeals since it really prevailed there and the Supreme Court's Opinion is based only upon matters of procedure and proper remedy and does not reverse the case on its merits. I think this position is well taken and the defendant, West Virginia Pulp and Paper Company, will be allowed to tax its costs in the appellate proceedings in the Circuit Court of Appeals and these will be offset against the costs taxed by the plaintiff in the proceedings in the Supreme Court. These amounts of costs will of course, be limited to the appellate proceedings and the matter of costs in the District Court will be left for the final disposition of the case. Accordingly, it is

Ordered that the motion to set aside, cancel and stay the execution hereinabove referred to be and the same is hereby granted. It is

Further ordered that leave be granted to tax and offset costs in accordance with the above set forth views.

J. WATIES WARING,
United States District Judge.

Charleston, S. C., May 13, 1947.

A true copy, attest.

[SEAL.]

ERNEST L. ALLEN,
Clerk of U. S. District Court
East. Dist. So. Carolina.